No. 2829

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALASKA STEAMSHIP COMPANY, Owner and Claimant of the Steamship "Seward,"

Appellant,

vs.

ARTHUR J. GILBERT,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

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STATEMENT

This is an appeal from a decree in admiralty of the District Court of the United States for the Western District of Washington, Northern Division.

The libel was filed by Arthur J. Gilbert against the S. S. "Seward" to recover wages and damages for an alleged wrongful discharge from employment as night watchman on that vessel.

The Alaska Steamship Company, owner of the S. S. "Seward," made claim thereto and filed its answer to the libel, justifying the discharge of the libelant on the ground of insubordination and disobedience to officers of the vessel.

The cause came on to be heard by the court below on depositions taken by stipulation of counsel and the evidence of witnesses produced in open court, and was argued by counsel on both sides.

The libelant regularly shipped as night watchman on board the S. S. "Seward" for a voyage from Seattle, Washington, to Anchorage, Alaska, and return to Seattle, at a monthly wage of Fifty Dollars ($50.00). There were no hours of work for libelant specified in the shipping articles; but libelant's usual hours were from six P. M. to six A. M.

During the course of this voyage, while the vessel was lying at Annex Creek, Alaska, towards six o'clock of the evening of October 3, 1915, a dispute arose between the libelant and the mate of the vessel as to the duties of the libelant. The mate reprimanded the libelant for not having out the ship's lights and ordered him to put them out immediately; and the libelant denied his duty to do so before six o'clock P. M., and refused to do so unless paid overtime therefor. It does not appear that the libelant put out the lights that night; but the next day, October 4th, the vessel having arrived at Juneau, Alaska, the mate

tendered libelant the money due him as wages for the voyage to that port and discharged him. Subsequently, in the evening of that day, the libelant attempted to go to work as usual; but was prevented by the mate and finally left the ship.

It was the contention of the libelant in the court below that he was wrongfully discharged, in that he did not refuse obedience to the orders of the mate; or if he did hesitate about obeying them, he finally did perform his duties; and that his altercation with the mate was merely an endeavor to ascertain whether or not the mate intended to pay him overtime for working before six o'clock P. M., which was the hour when he usually put out the ship's lights.

On the other hand the steamship company contended that the libelant was insolent and disrespectful to a superior officer; refusing obedience to the mate's lawful commands and derelict in his duty; when the vessel was at sea; in a position of danger and necessarily depending upon the trustworthiness of libelant for her safety and the safety of those on board.

The court decided that the libelant did not intend to refuse obedience to the orders of the mate; that he was justified in assuming that his hours on duty were from six P. M. to six A. M. until otherwise notified and that the first intimation that his hours were changed would suggest extra time; that there was no showing of disqualification or unfitness for service; nor

mutinous, contentious or rebellious conduct; that the mate should have dealt with the libelant in a more indulgent spirit; that libelant should not have used the expression to his superior officer which he did; that there was nothing disrespectful in the words used, or any suggestion of disrespect or insubordination, even though there was a suggestion of liability for overtime; and that the mate would not, under the circumstances, have the right to discharge him.

Thereafter a decree was entered that the libelant recover his wages; his fare in returning to Seattle, Washington; and his expenses while at Juneau, Alaska, the port of his discharge, together with a proctor's fee and costs of suit.

The libelant filed a cost bill to which claimant objected on the ground that it included a proctor's fee for taking depositions which were not used, the witnesses having been produced and examined in court; that it included an allowance for the cost of transcribing depositions which were not used, the witnesses having been produced and examined in open court; and that it included a witness fee for the libelant. The costs were taxed by the clerk, allowing the proctor's fee for taking depositions as claimed by libelant; disallowing the cost of transcribing depositions of witnesses afterward produced and examined in open court, and disallowing a witness fee to the libelant. An appeal was taken by the libelant to the court on the de-

cision of the clerk; which decision was sustained except as to the disallowance of the cost of transcribing the depositions of witnesses afterward produced and examined in open court; the court finding that such depositions were taken in good faith, though the necessity therefor was eliminated at the time of the hearing, and allowed the costs for such depositions.

From the foregoing proceedings and decrees the claimant has appealed and makes the following assignment of errors:

ASSIGNMENT OF ERRORS

1. The court erred in decreeing that the libelant have and recover his wages for the voyage mentioned in the libel.

2. The court erred in decreeing that the libelant have and recover his fare expended in returning to the terminal port.

3. The court erred in decreeing that the libelant have and recover his expenses incurred by his enforced stay in Juneau.

4. The court erred in allowing the libelant costs and an attorney's fee for depositions taken but not used.

QUESTIONS INVOLVED

The money damages decreed against the appellant by the court below are not sufficient to justify this appeal; as the non-taxable costs incurred in prosecuting

it exceed the pecuniary value to this appellant of a reversal of that decree.

We desire to impress upon this court that the real question involved is the authority of a ship's officers over members of her crew; the lightest limitation of which may have a far reaching effect and lessen the security of a vessel, her cargo and those on board.

The instant question, raised by the first three assignments of error, the decision of which involves this more important one, is whether or not the officers of a ship may properly discharge a seaman who neglects and fails in the duties for which he shipped and questions the propriety of the commands of his superior officer.

The second question, raised by the fourth assignment of error, involves a matter of practice and is argued here that the practice may be settled. It is whether or not a party to an admiralty suit is entitled to his disbursements for taking depositions which he did not use.

The argument of the appellant will be confined to a discussion of these two questions.

ARGUMENT

I.

THE LIBELANT WAS LAWFULLY DISCHARGED FOR INSUBORDINATION AND DISOBEDIENCE TO THE LAWFUL COMMANDS OF HIS SUPERIOR OFFICER.

(A) THE CONDUCT OF LIBELANT AMOUNTED TO INSUBORDINATION AND DISOBEDIENCE.

The libelant had shipped as night watchman, a position of much responsibility and trust. It was his duty to place the ship's lights, required by law as a measure of safety at sea; to keep watch over the anchorage and security of the ship in her berth; and to keep watch vigilantly over the ship and her cargo. (Apostles, pp. 14, 24, 30, 33, 50, 68.) Clearly a duty of the first magnitude and to be performed at a time when the officers and men would seek rest from the labors of the day, secure in the fidelity of this watchman.

Fidelity to duty is implied in every seaman's contract, and was expressly incorporated in the shipping articles signed by the libelant in these words, "and the said crew agree to conduct themselves in an orderly, faithful and honest manner, to be at all times diligent in their respective duties, and to be obedient to the lawful commands of the said master, or of any person who shall lawfully succeed him, and of their superior

officers, in everything relating to the vessel, and the stores and cargo thereof, * * * " (Apostles, p. 67.)

At the time of libelant's altercation with the mate, the ship was lying at or near Annex, or Sheep Creek, Alaska. It was the libelant's own testimony that it was getting dark and was raining. (Apostles, pp. 49, 54.) Mr. Roblee, the mate, testified that it was dark, raining and blowing a gale (Apostles, p. 69); and Mr. Johnson, the master, testified that it was a black, rainy night. (Apostles, p. 80.)

Under such weather conditions it was imperative that the ship's lights be out, as admitted by libelant (Apostles, p. 50); and testified to by the mate. (Apostles, p. 69.) It was part of libelant's duties to put out the ship's lights when necessary. (Libelant's testimony, Apostles, p. 50; mate's testimony, Apostles, pp. 69, 78.) Yet the libelant made no move to perform his duty until six o'clock P. M.

When accosted by the mate for his dilatoriness, as expressed in his own testimony, "So I looked at my watch and saw what time it was, it was still a quarter to six by my watch. So I told him it was not six o'clock yet, and he said, 'six o'clock nothing,' he says, 'you are supposed to be on watch at five o'clock in port.' I said my hours were from six to six, that is an agreement I made when I shipped; and he says, 'you had better come on at five in port.' I says, 'alright I will come on watch at five o'clock in port,' I says, 'it

don't make any difference to me, only I have got an hour more overtime for it.'" (Apostles, pp. 40, 52.) Or, as testified to by Oliver Woolhouse, mess-boy on the same voyage and a witness called by libelant, "He (the mate) came down about four o'clock in the afternoon and asked Mr. Gilbert why he was not on watch, and Mr. Gilbert told him he was not supposed to be there—to go on watch until six o'clock, and he told him he was supposed to go on watch when it was dark; and he told him his time was from six to six, well, he told him that he was supposed to go on at five o'clock. So they went on and he wanted to know whether he was going to not, and he told him no, he was not going unless he was going to give him an hour overtime which he said he was entitled to." (Apostles, p. 10.) Or as the mate testified: "Met him in the athwartship alleyway, coming from the mess room, and I asked him why he wasn't on watch. He said he didn't have to go on watch. I said, 'what's the matter with your anchor light?' 'Well,' he says, 'I don't have to put up any light without overtime.' And, 'Well,' I says, 'You will do as you are told around here, Gilbert, or you will hit the beach.' He says, 'Don't kid me like that, old-timer; I am too old in the game,' and I just simply told him it was no kidding." * * * "I asked him then, right then and there in the alleyway, I says, 'Do you absolutely refuse to put out a light before six o'clock without overtime?' and he looked and stammered for a minute, he says, 'I do.' I said, 'all right.' I went

forward and knocked off one of the men and put him down to get a light up." (Apostles, pp. 70, 71.)

What evidence could be clearer that the libelant took it upon himself to determine his duty toward the vessel; and to put his own wishes above the commands of his superior officer?

(B) SUCH CONDUCT JUSTIFIED LIBELANT'S DISCHARGE.

The enormity of a seaman's disobedience is thus put by Mr. Parsons:

"Disobedience or misconduct of a sailor is of necessity punishable with great severity, because discipline must be preserved, as without it the ship would always be in great peril, and no voyage could be successfully conducted."

(Law of Shipping, Vol. I, p. 463.)

MacLachlan, an English writer of authority, says:

"Positive disobedience is an offense of the grossest kind. It challenges the existence of authority. If open and avowed, especially if accompanied with insolent language or acts of violence to the officers, it speedily engenders mutiny, and compromises the safety of the ship and all on board."

(Law of Merchant Shipping, p. 266.)

In the case of the *Richard Matt,* 20 Fed. cases 11766, the libelants, being seamen on the Great Lakes, refused to work on Sunday unless paid double, when there was no provision for double wages for Sunday work in the shipping articles. The master refused

the libelants bedding and heat, discharged them and refused to give them any wages. The court allowed them wages *to the time of discharge* and their return fare; saying:

"The *captain had a right to discharge them for this disobedience,* and, if he had contented himself with doing that at the proper time, and under the proper circumstances, I should have refused all compensation to the men, on the ground of forfeiture of wages for disobedience." (Italics are ours.)

In the case of *Johnson vs. The Cyane,* Fed. Cas. 7381, the libelant was ordered to work on Sunday when his vessel was lying at Oun, Alaska, where by the Russian calendar, our Saturday was Sunday, and our Sunday was regarded as a regular business day. Libelant refused to work and was discharged.

The court allowed wages *up to the time of the discharge* on the ground that the libelant was honestly mistaken as to his duty to work. The court said, however, "In all cases, obedience is the first duty of the seaman, and it is only when the command is clearly unlawful, or the duty exacted is plainly unreasonable and unnecessary, that a refusal to obey can be for a moment countenanced. In the case of *Ulary vs. The Washington,* Fed. Cas. 14323, Judge Hopkinson says: 'The libelant contends that he was not bound to work on Sunday. There is no law for this position. The nature of the services requires that the men should do so, and *they must not be allowed to set themselves up*

as judges, and refuse to do their duty on such excuses.'" (Italics are ours.)

Libelant endeavored to palliate his conduct by evidence that his usual hours were from 6 P. M. to 6 A. M. (Apostles, p. 40); that he was not notified that his hours had been changed (Apostles, p. 43). But the shipping articles contained no such provision (Apostles, p. 67); nor was there any such agreement made by the mate when hiring libelant (Libelant's cross-examination, Apostles, p. 50); and it was in evidence that a watchman may be required to do duty outside of such hours, as circumstances demand. (Libelant's cross-examination, Apostles, p. 50; cross-examination of Cezar Curty, libelant's witness, Apostles, pp. 26-27; cross-examination of P. Bering, libelant's witness, Apostles, p. 33.)

Further, the shipping articles contained no provision for a watchman's overtime (Apostles, p. 67). The libelant seemed to justify his conduct in demanding overtime on printed regulations of the Sailors' Union, which he carried with him and to which he referred (Apostles, pp. 18-25, 32); or an agreement between the shipowners and the Sailors' Union of the Pacific. (Respondent's, or Claimant's Exhibit 1.)

Mr. P. B. Gill, business agent for the Sailors' Union of the Pacific, at Seattle, called by the claimant, testified that this agreement (Resp. Exhibit 1) was

the working agreement between this company and the union (Apostles, p. 64); that the agreement contained no stipulation that a watchman's hours should be from 6 P. M. to 6 A. M. (Apostles, p. 65); that outside of the agreement such was the general custom, but could be varied (Apostles, p. 66); and that this agreement (as will be seen upon inspection of the exhibit) contained a clause that "Members shall use their best judgment at all times and if in doubt what shall be charged as overtime, shall do the work required of them and then refer the case to the union for adjustment." Section 13. (Apostles, p. 65.)

These extracts from the evidence show that the conduct of the libelant in refusing to work before six o'clock in the evening, when the ship was in a position of danger, the night growing dark and the rain falling, was not justified by his shipping articles; by any agreement with the mate who hired him; by the agreement between the company and the union; or by any custom. On the contrary he acted directly in opposition to every rule of binding obligation which should govern his conduct on board ship.

In concluding this part of the argument we would call to the court's attention that the appellant does not contend that the acts of libelant justified his discharge and a forfeiture of all his wages. On the contrary his wages earned prior to his discharge were tendered

the libelant at the time and no claim has been made for them in this proceeding.

We beg the court to consider that the responsibility for the safety of the ship, the lives of her passengers and crew, and the security of her cargo rests upon her officers; that their authority over her crew, once infringed upon is broken forever; and that the certainty of a faithful performance of their duties by the seamen and a prompt obedience to the commands of their superior officers is of vital importance to every ship that goes to sea.

II.

WHERE A PARTY TAKES DEPOSITIONS, THE NECESSITY FOR WHICH IS ELIMINATED AT THE TIME THE CAUSE IS CALLED FOR TRIAL AND THE WITNESS IS PRESENTED IN COURT FOR ORAL EXAMINATION, AND THE DEPOSITIONS ARE NOT USED, NO COSTS CAN BE ALLOWED FOR SUCH DEPOSITIONS.

The testimony of the libelant, Arthur J. Gilbert, and of P. Bering, a witness on his behalf, was taken by deposition before trial by stipulation of proctors (Apostles, pp. 8 and 36). The deposition of libelant was not used, as he was produced and examined in open court (Apostles, pp. 37 to 62); but the deposition

of P. Bering was used, the witness having been orally examined on another matter (Apostles, pp. 62 and 82).

The libelant included in his cost bill a proctor's fee for taking the deposition of P. Bering and the cost of the transcript of all the depositions, including his own and that of P. Bering. To these items the claimant excepted and exception was allowed to the item for the transcript; the clerk disallowing costs for transcript of the depositions of Arthur J. Gilbert and P. Bering (Apostles, pp. 88-89). On appeal by libelant to the court, the costs for transcript of all the depositions were allowed on the ground that the depositions were taken in good faith although the necessity for their use had disappeared (Apostles, p. 90).

No objection is here made to the allowance of such costs for the deposition of P. Bering; for that deposition was in fact used on the trial without objection, although the witness was present in court and afterward examined on another point. It is to the allowance of costs for the transcript of libelant's own deposition, he having been produced and examined in open court and his deposition not used, that the fourth assignment of error is directed.

It is the rule in admiralty, as in other courts, that the allowance of costs depends upon statutory authority, or some rule of court made in pursuance of a statute. As stated by Judge McPherson, in the Third

Circuit, "Ultimately, no doubt, the power to impose costs must be found in a statute; but the legislature may grant the power in general terms to the courts, and these tribunals may then establish a fee bill by a rule or order that will have the binding force of a legislative act. This grant has already been made by Congress * * *."

Tesla Electric Co. vs. Scott, 101 Fed. 524.

Again, in this Circuit, Judge Gilbert, in the case of *Pacific Mail S. S. Co. vs. Iverson,* 154 Fed. 450, said at page 452, "While costs in admiralty are within the discretion of the court and may be allowed or denied on equitable considerations, the amounts and items of the costs allowable are not within the court's discretion but are fixed by statute. The court has no power to allow costs other than statutory costs, except in cases where expense has been incurred in the conduct of the case, under the order of the court."

The statutes of the United States make no provision for the allowance of costs in such a case as this. The only rule of the court below in any way applicable to such a case is Rule 70, section 7, subds. (d) and (f), which are as follows:

"(d) The fees of the reporter for taking down testimony and proceedings in court, or before a master or examiner, and for taking down arguments or other matter by order of the court or by stipulation of the parties, and *for transcribing testimony or proceedings*

before the court or before a master or examiner, and for transcribing arguments or any other matter by order of the court or by stipulation of the parties, shall be taxed as costs." (Italics are ours.)

"(f) Every deposition, whether taken before an examiner or upon commission, and *read or offered in evidence,* shall be deemed to have been admitted in evidence, unless the court has expressly excluded the same." (Italics are ours.)

It is clear that whatever effect the general language of subdivision "d" of Section 7, Rule 70, may have upon the right to tax as costs disbursements for depositions, it is qualified by the implication of subdivision "f," that the depositions must have been used.

This view is in accordance with the practice of allowing a proctor's fee for taking depositions under U. S. R. S. Sec. 824; which is not allowed if the deposition is not used. (*Barnardin vs. Northall,* 83 Fed. 241; *Cahn vs. Lung,* 28 Fed. 396.)

Bearing in mind that these depositions were taken *de bene esse,* and not upon a reference of the cause to a commissioner, it is obvious that the right to take the depositions was a privilege extended to the libelant as a convenience depending upon the necessity of the libelant at the time of trial, which did not arise. This is shown by the testimony of the libelant, the taking of whose deposition is under consideration, when appearing in court as a witness at the final hearing, that he would not accept employment on other vessels; *because such employment would prevent his being*

present when this cause came on to be heard before the court. (Apostles, pp. 45-46 and 59) (Italics are ours.)

The court below failed to give this distinction any attention and apparently overlooked the effect of libelant's testimony, above referred to. In allowing libelant his disbursements in taking these depositions, which were not used, the original necessity for which was directly negatived by libelant's own testimony, the court acted without authority of statute or rule of court and contrary to the established practice of admiralty courts.

The case of *The Persiana,* 158 Fed. 912, is directly in point. There the libel was dismissed on claimant's motion, he not having offered in evidence depositions taken by him for use at the trial. The court said:

"The libel is dismissed; but as the claimant did not offer his depositions in evidence he can tax neither his costs nor *disbursements* in respect of said depositions." (Italics are ours.)

This case should be a conclusive authority upon this point and is clearly consonant with the law.

Respectfully submitted,

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